Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

June 3, 1996

Mr. John T. Richards
Assistant General Counsel
Texas Department of Health
1100 West 49th Street
Austin, Texas 78756-3199

OR96-0866

Dear Mr. Richards:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code. Your request was assigned ID# 39299.

The Texas Department of Health (the "department") received five requests for information relating to the selection of health maintenance organizations in connection with certain Medicaid programs. You submitted a copy of the requested information to this office and assert that this information is excepted from required public disclosure by section 552.104 of the Government Code. You also indicated that three of the companies that submitted bids to the department marked certain information confidential as "trade secrets."

Pursuant to section 552.303(c) of the Government Code, on April 17, 1996, our office notified the department by letter sent via facsimile that you had failed to submit information necessary to render a decision, specifically, a copy of the written requests for information, a copy of the specific information being requested, marked to indicate which exceptions apply to the which specific documents.[1] We requested that the department provide this information to our office within seven days from the date of receiving the notice. The notice further stated that under section 552.303(e), failure to comply would result in the legal presumption that the requested information is public information.

Although the department provided our office with part of the requested information on April 18 and 24, 1996, the department did not provide copies of four of the requests for information: (1) the February 27, 1996 letter from Barry Senterfitt of Akin, Gump, Strauss, Hauer & Feld; (2) the February 27, 1996 letter from Patricia

[1]A governmental body is also required to submit this information pursuant to section 552.301(b) of the Government Code.

Kolodzey of First Care; (3) the February 2, 1996 letter from Carl Ayers of United Communications Group; and (4) the February 29, 1996 letter from Dwayne T. Carter of Hilgers & Watkins. Thus, required by section 552.303(e), the information that is the subject of these four requests for information is presumed to be public information. Information that is presumed public must be released unless a governmental body demonstrates a compelling interest to withhold the information to overcome this presumption. *See Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.--Austin 1990, no writ) (governmental body must make compelling demonstration to overcome presumption of openness pursuant to statutory predecessor to Gov't Code § 552.302); Open Records Decision No. 319 (1982). A compelling reason that will overcome the presumption of openness may only be shown in those situations where the information is deemed confidential by some other source of law or if third party interests are at stake. Absent a compelling reason why the information at issue should not be released, the information that is responsive to these four requests is presumed to be public and must be released.

The department asserts that the requested information is excepted from disclosure under section 552.104 of the Government Code. This exception to disclosure protects a governmental body's interest, does not make information "confidential," and may be waived by a governmental body. Open Records Decision No. 592 (1991) at 8. Because this exception does not constitute a compelling reason to withhold information, the department may not withhold under this exception the information that is responsive to the four requests that were not submitted to this office.

With regard to the February 28, 1996 request from Louie Heerwagen of NYLCare, which you submitted to this office, we find that the department may not withhold information that is responsive to this request under section 552.104. Mr. Heerwagen requests copies of "the evaluations on all respondents in both Bexar and Travis counties conducted by your 5 teams and the summary evaluation." This information is among the information requested in at least two of the requests for information that you did not submit to this office.[2] Because the department did not submit copies of these requests for information, this information is presumed public and may not be withheld from disclosure under section 552.104 from any of the requestors, including the request from Mr. Heerwagen that was submitted to this office. *See* Gov't Code § 552.007 (prohibiting selective disclosure), *see also* Open Records Decision No. 400 (1983) at 2.

Moreover and in the alternative, even if the department had met its burden under sections 552.301 and 552.303, we find that section 552.104 would not serve as a basis for

[2] According to your March 8, 1996 letter to this office, the February 27, 1996 letter from Barry Senterfitt of Akin, Gump, Strauss, Hauer & Feld seeks, among other information, the "evaluation or scoring sheets" and the "composite rating score" for the bids submitted for Bexar and Travis counties. The February 29, 1996 letter from Dwayne T. Carter of Hilgers & Watkins seeks all records "pertaining to [the department's] decision made public on February 26, 1996, relating to the Texas Medicaid STAR program." These requests appear to encompass the information requested by Mr. Heerwagen's request.

this office. Section 552.104 protects from required public disclosure "information which, if released, would give advantage to competitors or bidders." Although governmental bodies that properly raise this exception may withhold bidding information while the governmental officials are in the process of evaluating the proposals, section 552.104 does not except bids or proposals from disclosure once the bidding is over and the contract is in effect. Open Records Decision Nos. 306 (1982); 184 (1978). In your March 8, 1996 letter to this office, you indicated that finalists either had been or would soon be selected and that contracts would be executed in April and early May. Based on this information, we find that the department has no valid section 552.104 claim and may not withhold any of the requested information under this exception.

In addition to section 552.104, you indicated that three companies that submitted proposals to the department in the health maintenance organization selection process indicated that their proposals contain confidential information or trade secrets. This office notified these companies of the requests for information and solicited arguments regarding whether the information requested is confidential. Each of these companies responded, arguing that the proposals they submitted are excepted from disclosure under section 552.110 of the Government Code.

Section 552.110 of the Government Code excepts from disclosure:

> A trade secret or commercial or financial information obtained from a person and privileged or confidential by statute or judicial decision. . . .

Because this exception protects a third party's interests, a demonstration that information is protected under this exception constitutes a compelling reason that will overcome the presumption of openness. We therefore consider whether any of the three companies have established that the requested information is excepted from disclosure under section 552.110.

Section 552.110 is divided into two parts: (1) trade secrets and (2) commercial or financial information, and each part must be considered separately. The Texas Supreme Court has adopted the definition of "trade secret" from the Restatement of Torts, section 757, which holds a "trade secret" to be:

> any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers. It differs from other secret information in a business . . . in that it is not simply information as to a single or ephemeral event in the conduct of the business . . . . A trade secret is a process or device for continuous use in the operation of the business. . . . [It may] relate to the sale of goods or to other

> operations in the business, such as a code for determining discounts, rebates or other concessions in a price list or catalogue, or a list of specialized customers, or a method of bookkeeping or other office management.

RESTATEMENT OF TORTS § 757 cmt. b (1939); *see Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex.), *cert. denied*, 358 U.S. 898 (1958). If a governmental body takes no position with regard to the application of the "trade secrets" branch of section 552.110 to requested information, we accept a private person's claim that information is excepted from disclosure if that person establishes a prima facie case that the information is a trade secret and no one submits an argument that rebuts the claim as a matter of law. Open Records Decision No. 552 (1990) at 5.[3]

We conclude that none of the three companies has established a prima facie case that their proposals are trade secrets. Although two of the companies address the six factors that the Restatement lists as indicia of whether information constitutes a trade secret, we find that on its face, the information submitted by all three companies does not support a claim that it is a trade secret. Much of the information contained in the proposals appears to have been widely distributed, such as brochures, educational material, and certain forms. Other information includes publicly available information such as articles of incorporation or corporate by-laws. For information to be protected as a trade secret, it must be information that is not publicly available or readily ascertainable by independent investigation. *Numed, Inc. v. McNutt*, 724 S.W.2d 432, 435 (Tex. App. -- Forth Worth 1987, no writ). If and to the extent the proposals contain confidential information consisting of a "formula, pattern, device or compilation of information," none of the three companies have sufficiently identified this information or supplied this office with sufficient evidence to establish a prima facie case that the information is a trade secret. *See* Open Records Decision No. 419 (1984) at 3 (general claim that information is excepted from disclosure not sufficient where exception clearly not applicable to all information). Accordingly, the proposals may not be withheld under the trade secret portion of section 552.110.

To fall within the second part of section 552.110, the information must be made confidential by a statute or judicial decision. Open Records Decision No. 592 (1991) at 6. In Open Records Decision No. 639 (1996) the Attorney General held that the case of *National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974), which interprets exemption four of the federal Freedom of Information Act ("FOIA), was a "judicial decision" for purposes of section 552.110. Consequently, if a governmental body or other entity can meet the test established in *National Parks & Conservation Ass'n*, the

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[3]The six factors that the Restatement gives as indicia of whether information constitutes a trade secret are: "(1) the extent to which the information is known outside of [the company]; (2) the extent to which it is known by employees and other involved in [the company's] business; (3) the extent of measures taken by [the company] to guard the secrecy of the information; (4) the value of the information to [the company] and [its] competitors; (5) the amount of effort or money expended by [the company] in developing the information; (6) the ease or difficulty with which the information could be properly acquired or duplicated by others." RESTATEMENT OF TORTS, *supra*; *see* also Open Records Decision Nos. 319 (1982) at 2, 306 (1982) at 2, 255 (1980) at 2.

information may be withheld from disclosure. To be held confidential under *Nation Parks & Conservation Ass'n*, information must be commercial or financial, obtained from a person, and privileged or confidential. *National Parks & Conservation Ass'n*, 498 F.2d at 766. To succeed with a claim under the commercial or financial information portion of section 552.110, the party seeking to prevent disclosure must show by specific factual or evidentiary material, not conclusory or generalized allegations, that it actually faces competition and that substantial competitve injury would likely result from disclosure. Open Records Decision No. 639 (1996) at 4. The three companies, however, either did not argue that the requested information is excepted under this test or failed to provide sufficient information for this office to make such a determination. Consequently, the information may not be withheld from disclosure under section 552.110.

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and may not be relied upon as a previous determination regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,

Robert W. Schmidt
Assistant Attorney General
Open Records Division

RWS/ch

Ref.: ID# 39299

Enclosures: Submitted documents

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